Office-Supreme Court, U.S.
FILED
APR 24 196

IN THE

Supreme Court of the United States

October Term 1961

No. **901**

EDUARD VAN DER HEYDT, LIBERTAS, S. A., AND RATIO, S. A.,
Petitioners,

v.

ROBERT F. KENNEDY, ATTORNEY GENERAL OF THE UNITED STATES OF AMERICA, AND ELIZABETH RUDEL SMITH, TREASURER OF THE UNITED STATES OF AMERICA,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

ISADORE G. ALK
1026 Woodward Building
Washington 5, D. C.

IRVING MOSKOVITZ
PETER N. SCHILLER
40 Wall Street
New York 5, New York
Attorneys for Petitioners

Of Counsel:
GRAUBARD & MOSKOVITZ
40 Wall Street
New York 5, New York

32 CASE PRESS INC., 421 Hudson St., N. Y.—ORegon 5-4540

INDEX

	Page
Opinions Below	2
Jurisdiction	2
Questions Presented	2
Statutes Involved	3
Statement of the Case	3
Decision of the Court of Appeals	7
Reasons for Granting the Writ	7
Conclusion	10
Appendix A	11
Appendix B	18
Appendix C	27
Appendix D	35
Appendix E	36

Table of Cases

Becker Steel Company v. Cummings, 296 U. S. 74	8
Hovey v. Elliott, 167 U. S. 211	9
Societe Internationale v. Rogers, 357 U. S. 197	2, 7, 8, 9

IN THE

Supreme Court of the United States

October Term 1961

No.

EDUARD VON DER HEYDT, LIBERTAS, S.A. AND RATIO, S.A.,

Petitioners,

v.

ROBERT F. KENNEDY, ATTORNEY GENERAL OF THE UNITED STATES OF AMERICA, AND ELIZABETH REDEL SMITH, TREASURER OF THE UNITED STATES OF AMERICA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners, Eduard Von der Heydt, Libertas, S.A. and Ratio S.A.— plaintiffs in an action under Section 9(a) of the Trading with the Enemy Act (50 U.S.C. App. 9(a)) to recover property summarily seized without hearing— pray that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the District of Columbia Circuit entered in the above case on February 1, 1962, rehearing denied February 20, 1962, which dismissed plaintiff's complaint without trial on the merits.

Opinions Below

The opinion of the District Court (J.A. 817-818) is unreported. The opinion of the Court of Appeals (Appendix B, *infra*, p. 18) is not yet reported. An earlier opinion (Appendix C, *infra*, p. 27) is reported at 251 F. 2d 17.

Jurisdiction

The judgment of the Court of Appeals for the District of Columbia Circuit was entered on February 1, 1962. A motion for rehearing was denied on February 20, 1962 (Appendix D, *infra*, p. 35). An order staying transmission of opinion and judgment of the Court of Appeals pending the filing of a petition for writ of certiorari was entered by that Court on April 2, 1962 (Appendix E, *infra*, p. 36). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Question Presented

In view of *Societe Internationale* v. *Rogers*, 357 U.S. 197:

Whether in a suit by a Swiss citizen and resident against the Attorney General, as successor to the Alien Property Custodian, for return of his property summarily seized without prior hearing, a pre-trial dismissal is authorized by F.R.C.P. 37 and, if so, whether such dismissal is violative of the due process and just compensation clause of the Fifth Amendment to the Constitution—

(a) where such pre-trial dismissal with prejudice was requested and granted as a penalty for failure to comply fully with a general pre-trial production order, (b) where

substantial production was made, (c) where no prejudice to the Alien Property Custodian was shown, (d) where no showing was made that the Custodian had been deprived of an opportunity to prepare his defenses, (e) where petitioners were given no opportunity to produce any missing documents found by the Court to be in existence, and (f) where a presumption of want of merit in petitioner's suit was expressly rejected.

Constitutional Provisions, Statutes and Federal Rules of Civil Procedure Involved

The pertinent constitutional provisions, statutes and Federal Rules of Civil Procedure are printed in Appendix A, *infra*, p. 11.

Statement of the Case

The individual petitioner is a citizen and resident of Switzerland. He is the sole beneficial owner of the two corporate petitioners, one of which is a Luxembourg corporation and the other a Swiss corporation.

On August 21, 1951, the then Attorney General vested without hearing the property involved in this proceeding on the alleged ground of "enemy taint". Ownership by petitioners of the vested property is conceded (J.A. 18).

Petitioners commenced suit under Section 9(a) of the Trading with the Enemy Act (50 U.S.C. War and National Defense Appendix, Sec. 9(a)) to recover their property. Thereafter, upon motion of respondents, a general production order was entered requiring the individual petitioner to produce documents in the Netherlands, Germany and Switzerland. The production order was in sweeping terms.

calling for the production of "all books of account"; "all records", "all correspondence" and "all other documents" within the broadest chronological categories (J.A. 119-124).

There was delay and confusion in the course of the production. However, substantially complete production was made. Respondents nevertheless filed a motion for dismissal, claiming that "full" production was not made (J.A. 214).

Respondents made no claim that non-production of any missing documents had deprived them of any important information or had otherwise prejudiced them in their preparation for trial. Instead they urged:

> "(D) defendants believe that the Court intends its orders to be obeyed in accordance with their terms and that the Court will not sanction a practice which makes discovery orders only executory until motions for dismissal are filed. This can be made clear by imposing the appropriate penalty of dismissal upon plaintiffs for their past misconduct" (J.A. 343).

The motion judge ordered a hearing to be held. No testimony was presented by the respondents and no claim was made at the hearing that non-production was causing defendants any prejudice or was preventing preparation for trial. At the close of the hearing in December 1956, the court dismissed the complaint, ruling as follows:

> "All documents which were called for by the Court's order not having been produced, and the plaintiffs not having satisfactorily shown to the Court that such documents do not exist, and the plaintiffs not having satisfactorily explained to the Court why they have not been produced; and the pattern of the conduct of the plaintiffs' duly authorized

representatives, but not including present counsel, clearly showing an unwillingness on their part to make a full disclosure to the defendants; and the plaintiffs' answers to the defendants' interrogatory No. 23 being too vague and wholly insufficient since the answers furnish no details as to any specific documents. I find that the discovery order of this Court of February 9, 1956, has not, in good faith been complied with." (J.A. 817-8).

On appeal, in January 1958 the Court of Appeals remanded the case with instructions to make specific findings. Three years later in February 1961, the lower court filed findings of fact and conclusions of law. It made no findings of facts with respect to the substantial production which had been made. Instead, it merely found that certain documents had not been produced and that these documents fell within the ambit of the general discovery order. (J.A. 1025-1041).

Despite respondents' request (J.A. 1010, 1020, 1021), the court refused to find that petitioner evinced "a clear disregard for truth and the utter unreliability of his declarations with regard to the non-existence or the disappearance of records"; the court also refused to find that petitioner had "distorted the truth, gave false testimony at the hearing, and offered incredible excuses for the failure to make complete production"; the court further refused to find that his "statements and testimony regarding the taking and retention of documents by Swiss authorities . . . were

---

* In the interval, petitioners had located and produced a "V M journal," which up to this time respondents had repeatedly claimed was "the most significant" of the missing records. The lower court denied without opinion petitioners' motion to reopen the case so that the court might appraise the impact of the production of this journal (J.A. 959, 1000).

vague, inconsistent and not worthy of belief"; or that "his testimony that he routinely destroyed incoming correspondence after it had been answered by him is inconsistent with the facts . . . and not worthy of belief."*

Nevertheless and contrary to its oral ruling at the close of the hearing in December 1956, the lower court found that the petitioner as well as his authorized representatives had deliberately conceived a plan or pattern to reveal as little as possible of the records under his control and to avoid, to the extent possible, disclosure of those which might be harmful to his case; and that petitioner's testimony and demeanor at the hearing revealed and substantiated the plan; and that petitioner had not given a satisfactory explanation of his failure to produce the certain mentioned documents (J.A. 1031-2).

The Court concluded that "petitioner's failure in good faith to produce records within his possession, custody and control, relating as it does to many documents relevant and material to the issue of this case, constitutes a refusal to obey an Order of this Court made under Rule 34, F.R.C.P., and is of such extent and gravity as to require dismissal of the action pursuant to Rule 37(b) (2) (iii)"; that as a result respondents were deprived of a full and fair opportunity to prepare their defenses and the court would be deprived of evidence indispensable to a proper adjudi-

* The hearing disclosed that in 1946, at the behest of the American Government, the Swiss authorities had made an intensive investigation of petitioner's wartime activities in the course of which they searched his files and seized various documents; and that most of this material was confiscated by the Swiss authorities. Neither the District Court nor the Court of Appeals referred to this Swiss action although this was the real reason for the inability to make absolutely complete production.

cation of the issues; and that petitioner had not complied with the production order in good faith (J.A. 1040-1).

The court expressly stated that "no finding or conclusion that the Plaintiff is enemy tainted is implied from the action of the Court" (J.A. 1041).

The record and the court's original opinion do not indicate that the court gave any thought to the imposition of any sanction other than dismissal, notwithstanding the fact that the documents found by the court to be missing had not even been specified in the production order and that the lower court did not at any time enter any intermediary order specifying such documents to be produced.

Decision of the Court of Appeals

The Court of Appeals sustained the findings of the lower court. It held that the District Court had "found bad faith and willful refusal to comply with the order", that petitioner's reliance upon *Societe Internationale* v. *Rogers*, 357 U.S. 197 was misplaced, and, in effect, that there was no constitutional impediment to dismissal of the action without a trial on the merits. The Court did not discuss petitioner's contention that the procedure followed by the lower court violated due process.

Reasons for Granting the Writ

Review by the Court should be granted because of the constitutional questions presented. The importance of these questions in this class of case was stressed by this Court in *Societe Internationale, etc.* v. *Rogers*, 357 U.S. 197.

As in *Societe Internationale*, the property of petitioners was seized by the Alien Property Custodian summarily and without prior hearing and petitioners were relegated to the only remedy accorded them, suit under Section 9(a) of the Trading with the Enemy Act. This Court pointed out in *Societe Internationale* that "this summary power to seize property which is believed to be enemy-owned is rescued from constitutional invalidity under the Due Process and Just Compensation Clauses of the Fifth Amendment only by those provisions of the Act which afford a nonenemy claimant a later judicial hearing as to the propriety of the seizure." The remedy under Section 9(a) of the Act was granted in recognition of an obligation imposed by the Constitution and only the most compelling of circumstances justifies the withdrawing or curtailing of this remedy. Cf. *Becker Steel Company* v. *Cummings*, 296 U.S. 74, 79.

As this Court stated in *Societe Internationale*, "there are constitutional limitations upon the power of courts, even in aid of their own valid processes, to dismiss an action without affording a party the opportunity for a hearing on the merits of his cause." The gravity of the substantial constitutional questions is accented in this class of case where the petitioners were deprived of their property without prior hearing.

In *Societe Internationale*, the court found it unnecessary to decide the constitutional questions by construing F.R.C.P. 37 as not authorizing dismissal of the action where failure to comply with the discovery order was due to inability, and not to willfulness, bad faith, or other fault of petitioner. Here the Court likewise need not de-

cide the constitutional questions if it holds that F.R.C.P. 37 does not authorize dismissal absent any showing by the respondents of prejudice, absent any consideration of sanctions other than dismissal, and absent any showing as to what impact the missing documents might have on the ability of respondents to prepare their case and whether as in *Societe Internationale* the absence of "complete" disclosure may justify the District Court in drawing inferences unfavorable to petitioners, all of which could have been matters of proof without depriving petitioners of their right to a hearing on the merits.

The constitutional question will require decision by this Court if it holds that F.R.C.P. 37 permits dismissal of the complaint, in the circumstances presented here, as a penalty. It was because of past misconduct of petitioner or of his authorized representatives that respondents sought dismissal. The lower court's decision and finding make clear that the dismissal was not based upon any presumption or admission of want of merit. Such a dismissal, it is respectfully submitted, is a denial of due process. *Hovey v. Elliott*, 167 U.S. 211.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

ISADORE G. ALK
1026 Woodward Building
Washington 5, D. C.

IRVING MOSKOVITZ
PETER N. SCHILLER
40 Wall Street
New York 5, New York

Attorneys for Petitioners

Of Counsel:

GRAUBARD & MOSKOVITZ
40 Wall Street
New York 5, New York

APPENDIX A

United States Constitution, Amendment V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Section 9(a) of the Trading With the Enemy Act, As Amended, the Act of October 6, 1917, c. 106, Sec. 9(a), 40 Stat. 419, as Amended, 50 U.S.C.A. App. 1:

9. Claims to property transferred to custodian; notice of claim; filing; return of property; suits to recover.

(a) Any person not an enemy or ally of enemy claiming any interest, right, or title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States, or to whom any debt may be owing from any enemy or ally of enemy whose property or any part thereof shall have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States may

file with the said custodian a notice of his claim under oath and in such form and containing such particulars as the said custodian shall require; and the President, if application is made therefor by the claimant, may order the payment, conveyance, transfer, assignment or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States, or of the interest therein to which the President shall determine said claimant is entitled: *Provided*, That no such order by the President shall bar any person from the prosecution of any suit at law or in equity against the claimant to establish any right, title, or interest which he may have in such money or other property. If the President shall not so order within sixty days after the filing of such application or if the claimant shall have filed the notice as above required and shall have made no application to the President, said claimant may institute a suit in equity in the Supreme Court of the District of Columbia or in the district court of the United States for the district in which such claimant resides, or, if a corporation, where it has its principal place of business (to which suit the Alien Property Custodian or the Treasurer of the United States, as the case may be, shall be made a party defendant), to establish the interest, right, title, or debt so claimed, and if so established the court shall order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States or the interest therein to which the court shall determine said claimant is entitled. If suit shall be so instituted, then such money or property shall be retained

in the custody of the Alien Property Custodian, or in the Treasury of the United States, as provided in this Act and until any final judgment or decree which shall be entered in favor of the claimant shall be fully satisfied by payment or conveyance, transfer, assignment, or delivery by the defendant, or by the Alien Property Custodian, or Treasurer of the United States on order of the court, or until final judgment or decree shall be entered against the claimant or suit otherwise terminated.

* * * *

Federal Rule of Civil Procedure 34:

Rule 34. *Discovery and Production of Documents and Things for Inspection, Copying, or Photographing*

Upon motion of any party showing good cause therefor and upon notice to all other parties, and subject to the provisions of Rule 30(b), the court in which an action is pending may (1) order any party to produce and permit the inspection and copying or photographing, by or on behalf of the moving party, of any designated documents, papers, books, accounts, letters, photographs, objects, or tangible things not privileged, which constitute or contain evidence relating to any of the matters within the scope of examination permitted by Rule 26(b) and which are in his possession, custody, or control; or (2) order any party to permit entry upon designated land or other property in his possession or control for the purpose of inspecting, measuring, surveying, or photographing the property or any designated object or operation thereon within the scope of the examination permitted by Rule

26(b). The order shall specify the time, place, and manner of making the inspection and taking the copies and photographs and may prescribe such terms and conditions as are just.

* * * * *

Federal Rule of Civil Procedure 37:

Rule 37. *Refusal to Make Discovery: Consequences*

(a) *Refusal to Answer.* If a party or other deponent refuses to answer any question propounded upon oral examination, the examination shall be completed on other matters or adjourned, as the proponent of the question may prefer. Thereafter, on reasonable notice to all persons affected thereby, he may apply to the court in the district where the deposition is taken for an order compelling an answer. Upon the refusal of a deponent to answer any interrogatory submitted under Rule 31 or upon the refusal of a party to answer any interrogatory submitted under Rule 33, the proponent of the question may on like notice make like application for such an order. If the motion is granted and if the court finds that the refusal was without substantial justification the court shall require the refusing party or deponent and the party or attorney advising the refusal or either of them to pay to the examining party the amount of the reasonable expenses incurred in obtaining the order, including reasonable attorney's fees. If the motion is denied and if the court finds that the motion was made without substantial justification, the court shall require the examining party or the attorney advising the motion or both of them to pay to the refusing

party or witness the amount of the reasonable expenses incurred in opposing the motion, including reasonable attorney's fees.

(b) *Failure to Comply With Order.*

(1) *Contempt.* If a party or other witness refuses to be sworn or refuses to answer any question after being directed to do so by the court in the district in which the deposition is being taken, the refusal may be considered a contempt of that court.

(2) *Other Consequences.* If any party or an officer or managing agent of a party refuses to obey an order made under subdivision (a) of this rule requiring him to answer designated questions, or an order made under Rule 34 to produce any document or other thing for inspection, copying, or photographing or to permit it to be done, or to permit entry upon land or other property, or an order made under Rule 35 requiring him to submit to a physical or mental examination, the court may make such orders in regard to the refusal as are just, and among others the following:

(i) An order that the matters regarding which the questions were asked or the character or description of the thing or land, or the contents of the paper, or the physical or mental condition of the party, or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(ii) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or pro-

hibiting him from introducing in evidence designated documents or things or items of testimony, or from introducing evidence of physical or mental condition;

(iii) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(iv) In lieu of any of the foregoing orders or in addition thereto, an order directing the arrest of any party or agent of the party for disobeying any of such orders except an order to submit to a physical or mental examination.

* * * *

(d) *Failure of Party to Attend or Serve Answers.* If a party or an officer or managing agent of a party wilfully fails to appear before the officer who is to take his deposition, after being served with a proper notice, or fails to serve answers to interrogatories submitted under Rule 33, after proper service of such interrogatories, the court on motion and notice may strike out all or any part of any pleading of that party, or dismiss the action or proceeding or any part thereof, or enter a judgment by default against that party.

Federal Rule of Civil Procedure 41:

Rule 41. *Dismissal of Actions*

* * * *

(b) *Involuntary Dismissal: Effect Thereof.* For failure of the plaintiff to prosecute or to comply with these rules

or any order of court, a defendant may move for dismissal of an action or any claim against him. After the plaintiff has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. In an action tried by the court without a jury the court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a). Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue, operates as an adjudication upon the merits.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16,365

EDUARD VON DER HEYDT, *et al.*,

Appellants,

v.

ROBERT F. KENNEDY, Attorney General of the United States, *et al.*,

Appellees.

Appeal from the United States District Court for the District of Columbia

Decided February 1, 1962

Mr. Isadore G. Ilk for appellants.

Mr. Bruno A. Ristau, Attorney, Department of Justice, of the bar of the Supreme Court of Ohio, *pro hac vice*, by special leave of the court, with whom *Assistant Attorney General William H. Orrick, Jr.*, and *Messrs. David C. Acheson*, United States Attorney, and *Alan S. Rosenthal*, Attorneys, Department of Justice, were on the brief, for appellees. *Messrs. Arthur R. Schor, Geo. S. Leonard* and *James C.*

Appendix B

Appearances: Attorneys, Department of Justice, also entered appearances for appellees.

Before: Edgerton, Bastian and Burger, Circuit Judges.

Bastian, *Circuit Judge:* This is the second time this case has been before this court. Our previous opinion is reported in 102 U. S. App. D.C. 114, 251 F. 2d 17 (1958).

Appellant von der Heydt, a Swiss citizen, and two corporations solely owned by him [all hereinafter designated as plaintiff or appellant], sued to recover property which had been seized in 1951 by the United States under the Trading with the Enemy Act, 40 Stat. 411 (1917), 50 U.S.C. App. 1-39. Appellees defended the seizure on the ground that appellant was enemy-tainted. On the Government's motion, the District Court, on February 8, 1956, directed appellant to produce various records relating to financial transactions alleged to have probative value in establishing the enemy taint, and to answer a specified portion of appellees' Interrogatory 23, which had been served on appellant on June 28, 1955.

In March 1956, appellant allegedly having failed to produce any records, the Government moved for dismissal under Fed. R. Civ. P. 41(b) and 37(b)(2). The motion was granted after hearing but judgment was withheld on appellant's representation that production would be forthcoming. On production of some of the documents, but far from all, the grant of the motion for dismissal was vacated. Thereafter, additional documents, but still not all those called for, were produced and, in October 1956, the Government again moved for dismissal for failure to produce specific

documents covered by the production order; the motion also alleged insufficient response to the Government interrogatory.

Before ruling on the motion, the District Court heard testimony for nine days, received numerous exhibits, all presumably bearing on the issues of materiality of the records sought, possession, and control of those records by appellant, appellant's action constituting refusal to produce, and so forth. In granting the motion to dismiss, the District Court ruled as follows:

> "All documents which were called for by the Court's order not having been produced, and the plaintiffs not having satisfactorily shown to the Court that such documents do not exist, and the plaintiffs not having satisfactorily explained to the Court why they have not been produced; and the pattern of the conduct of the plaintiffs' duly authorized representatives, but not including present counsel, clearly showing an unwillingness on their part to make a full disclosure to the defendants; and the plaintiffs' answers to the defendants' interrogatory No. 23 being too vague and wholly insufficient since the answers furnish no details as to any specific documents, I find that the discovery order of this Court of February 9, 1956, has not, in good faith been complied with."

Appeal was taken from the order to dismiss. The record submitted to us consisted of a joint appendix of 942 pages, digesting pertinent parts of a record of over 1500 pages, all covering substantial issues. We held that we were unable to afford adequate appellate review without

Appendix B

to enter findings in relation to the several issues of the case and, accordingly, we remanded the case for such findings.

After the remand, and on October 16, 1958, appellant submitted to the District Court proposed findings of fact and conclusions of law, and subsequently on November 7, 1958, filed a motion to reopen the case for purposes of introducing additional testimony. This motion was denied by order dated January 19, 1959. The District Court entered findings of fact and conclusions of law and, on February 12, 1961, the case was dismissed with prejudice for failure to comply with the order of the court. The present appeal followed.

Appellant argues that in a case of this character due process requires that, before an action brought under § 9(a) of the Trading with the Enemy Act may be dismissed for failure to make full production, it is necessary for the court to pass upon three elements which must be present: (1) the existence of the documents must be proved by the party demanding production; (2) elements of materiality must be shown; and (3) elements of possession, custody and control must likewise be shown.

We have no quarrel with this statement.[1] The only question is whether or not such existence, materiality and control have been established, and we think they have been established in this case.

In the comprehensive findings filed by the District Court, that court reviewed the efforts of the Government to ob-

[1] This is the opinion above referred to, reported in 102 U.S. App. D.C. 114, 251 F. 2d 17 (1958).

tain possession of the documents and to obtain answers to the interrogatories. Without attempting to review the evidence in detail, we find that there runs through the record evidence of a studied effort on the part of appellant to avoid producing these documents and correspondence, which demonstrates almost to a certainty the determination of the appellant not to produce any documents which could be at all damaging to his case. We think the District Court properly held as it did in Finding 27:

> "27. Plaintiff von der Heydt and his authorized representatives deliberately conceived a plan or pattern to reveal to the defendants as little as possible of the records under his control and to avoid to the extent possible, disclosure of those which might be harmful to his case. Plaintiff von der Heydt has not in good faith complied with the order of this Court of February 8, 1956."

We think it only fair to add that the court's Finding 29, to the effect that appellant's testimony at the hearing revealed and substantiated the plan or pattern to avoid disclosure of the facts, was supported by substantial evidence.

The court further found that the partial production which was made established that appellant retained unimportant as well as important records and correspondence, and that much of the correspondence in his files in Switzerland which was not produced had not been destroyed for lack of importance but was removed or kept from the files by appellant, and that some of it related to charges by the Mayor of Zandvoort that appellant had collaborated with the Nazis in Holland during the war.

On the question of materiality, the court held that appellant and his agents having examined and culled the available records and having removed records which were then produced but which were deemed by them to be immaterial to appellant's case, the missing documents were material to the issues of the case; and the court, by its findings, proceeded to demonstrate the issue of materiality.

In short, the findings of the court demonstrated that the documents called for, or at least a number of them, were in existence, that they were material to the case, and that existence, possession, custody and control were clearly shown by the evidence before the court.

Insofar as appellant's failure to answer in good faith interrogatory 23, the court found, on adequate evidence:

"35. Thus von der Heydt did not in good faith answer interrogatory 23; but rather, in accordance with his plan or pattern to reveal as little as possible regarding the records, his answers were intentionally vague and insufficient.

"36. Specific and sufficiently detailed answers to the interrogatory, made promptly, would have made it impossible for von der Heydt to follow the pattern of piecemeal, partial and minimal discovery deliberately adopted in order to reveal as little as possible, and would have been inconsistent with the pattern of producing documents only when their production appeared necessary to avoid dismissal of the complaint. The refusal to answer the interrogatory specifically, without evasiveness, and in good faith, is consistent with von der Heydt's failure at the hearing to explain fully and honestly the reasons why the missing records were not produced."

Not only do we find that the findings of the court were not clearly erroneous but we hold that they were founded upon substantial and indeed overwhelming evidence.

Appellant's reliance upon *Societe Internationale v. Rogers*, 357 U.S. 197 (1958), is misplaced. There the Supreme Court held dismissal of a complaint filed under 9(a) of the Trading with the Enemy Act to be error. The District Court had ordered plaintiff to produce certain records of plaintiff's Swiss bank, and found the records to be relevant and within plaintiff's possession and control within the meaning of FED. R. CIV. P. 34. The records were not produced because their production would violate Swiss penal laws. The District Court found that an order prohibiting their production had been made by the Swiss Federal Attorney, and further found that plaintiff had shown good faith in its efforts to comply with the production order. Nevertheless the District Court dismissed the cause, with prejudice. This court affirmed. 100 U.S.App.D.C. 148, 243 F.2d 254 (1957). The Supreme Court, holding that dismissal of the complaint with prejudice was not justified, reversed and held that the power of the District Court to dismiss a complaint because of failure of the plaintiff to comply with a production order depends exclusively on FED. R. CIV. P. 37(b). The Supreme Court also held that the findings as to plaintiff's good faith and his sincere efforts to comply with the production order, in view of the constitutional questions bearing on the matter, required reversal. The Court said:

> "In view of the findings in this case, the position in which [plaintiff] stands in this litigation, and the

serious constitutional questions we have noted, we think that Rule 37 should not be construed to authorize dismissal of this complaint because of [plaintiff's] noncompliance with a pretrial production order *when it has been established that failure to comply has been due to inability, and not to willfulness, bad faith, or any fault of [plaintiff].*" [Emphasis supplied] 357 U. S. at 212.

The instant case is a far cry from *Societe Internationale*. Here, instead of evidence of good faith in efforts to comply with the order, the District Court found bad faith and willful refusal to comply with the order.

Nor are we impressed with appellant's claim that the order of dismissal was rendered as a result of "their past misconduct." There is no showing that that was the case. We think the District Court was amply justified in concluding as it did:

> "Plaintiff von der Heydt's failure in good faith to produce records and answer an interrogatory as required by the Order of this Court of February 8, 1956 deprives defendants of a full and fair opportunity to prepare their defenses and would deprive this Court of evidence indispensable to a proper adjudication of the issues."

Insofar as the unwillingness of the District Court to reopen the case is concerned, there are several answers. First, the case was remanded, not to be reopened but to make specific findings; and secondly, the matter of reopening was within the discretion of the court. We find no abuse of that discretion. In any event, the evidence

sought to be introduced could by no stretch of the imagination be termed newly discovered evidence. In addition, even if it could be so termed, it was not so material as to justify the court in reopening the case.

We have examined the other contentions urged by appellant and find no error justifying reversal.

Affirmed

APPENDIX C

UNITED STATES COURT OF APPEALS

DISTRICT OF COLUMBIA CIRCUIT

No. 13855.

ELEMENTOS DER HEILIGE Libertas, S. A., and Ratio, S. A.,

Appellants.

—v.—

WILLIAM P. ROGERS, Attorney General of the United States, and Ivy Baker, Priest, Treasurer of the United States,

Appellees.

Decided Jan. 2, 1958.

Mr. Isadore G. Alk, Washington, D. C., with whom Mr. Sidney S. Sachs, Washington, D. C., was on the brief, for appellant.

Mr. Myron C. Baum, Attorney, Department of Justice, with whom Mr. George B. Searls, Attorney, Department of Justice, was on the brief, for appellees. Mr. Irwin A. Seibel, Attorney, Department of Justice, also entered an appearance for appellees.

Before EDGERTON, Chief Judge, and BASTIAN and BURGER, Circuit Judges.

Appendix C

PER CURIAM.

The District Court granted appellee's motion to dismiss appellant's complaint for failure to produce documents and records for which an order to produce had been made. Before ruling on the motion, the District Court heard testimony for nine days and received numerous exhibits, all presumably bearing on the issues of materiality of the records sought, the possession and control of these records by appellant, appellant's actions constituting refusal to produce, and so forth. The District Court made no findings other than its order of dismissal which it characterized as containing findings. However, on the record before us, consisting of a Joint Appendix of 942 pages digesting pertinent parts of a record of over 1500 pages, all covering substantial issues, we are unable to afford an adequate appellate review without specific findings in relation to the several issues of the case in order that we may know the basis of the District Court's decision.

Appellant also urges that the statement of the trial judge[1] shows error in assigning the burden of proof. The burden of showing materiality of the information and ability to produce it rests on the one seeking discovery. At

[1] "All documents which were called for by the Court's order not having been produced, and the plaintiffs not having satisfactorily shown to the Court that such documents do not exist, and the plaintiffs not having satisfactorily explained to the Court why they have not been produced; and the pattern of the conduct of the plaintiffs' duly authorized representatives, but not including present counsel, clearing showing an unwillingness on their part to make a full disclosure to the defendants; and the plaintiffs' answers to the defendants' interrogatory No. 23 being too vague and wholly insufficient since the answers furnish no details as to any specific documents, I find that the discovery order of this Court of February 9, 1950, has not, in good faith been complied with."

a point the burden of going forward with the evidence may shift to the party asserted to be in possession or control. Absent specific findings to be reviewed in the light of the evidence, we cannot make an adequate assessment of this issue and our disposition of this appeal will afford opportunity for dealing with this.

As to the claim that the District Court erred in denying appellant's cross motion for discovery, we find no abuse of discretion.

Remanded with instructions.

BURGER, Circuit Judge (concurring).

I agree fully that findings are essential but I would rely not on our inherent power to call for findings in aid of appellate review but upon what appears to me to be the express and unambiguous command of Rule 41 of the Federal Rules of Civil Procedure, 28 U.S.C.A. To place my views in proper perspective a more complete statement of the case is called for than is needed for the solution reached by a majority of the court.

Appellant, a Swiss citizen,[1] sued to recover property which had been seized in 1951 by the United States under the Trading With The Enemy Act.[2] The Government defended the seizure on the ground that appellant was enemy tainted. On the Government's motion the District Court

[1] In addition to individual appellant Heydt, there are two nominal appellants: Libertas S.A., a Luxembourg corporation, and Ratio S.A., a Swiss corporation. Heydt is the sole and beneficial owner of these corporations.

[2] 40 Stat. 411 (1917), 50 U.S.C.A.App. §§ 1-39.

in January [illegible] produce various rec-
ords relating [illegible] ments alleged to have pro-
batively value in [illegible] the enemy taint. In March
1956, appellant h[illegible] ailed to produce any records, the
Government moved [illegible] dismissal under Fed. R. Civ. P. 41(b)
and 37(b) (2).[3] The motion was granted, but judgment
was withheld on appellant's representations that produc-
tion would be forthcoming. Upon production of some of the
documents the grant of the motion for dismissal was va-
cated. Thereafter additional documents were produced; in
October 1956 the Government again moved for dismissal
for failure to produce specified documents covered by the
production order.[4] After an extended hearing[5] the Dis-
trict Court granted the Government's motion for dismissal
by an order which recited:

> "All documents which were called for by the Court's order not having been produced, and the plaintiffs not

[3] Rule 41(b) provides: "For failure of the plaintiff * * * to comply with * * * any order of court, a defendant may move for dismissal * * *."

Rule 37(b) (2) provides: "If any party * * * refuses to obey * * * an order made under Rule 34 to produce any document * * * the court may make such orders in regard to the refusal as are just and among others the following: * * * An order * * * dismissing the action * * *."

Rule 34 provides: "Upon motion * * * the court * * * may (1) order any party to produce and permit the inspection and copying or photographing * * * of any designated documents * * * not privileged, which constitute or contain evidence relating to any of the matters within the scope of examination permitted by Rule 26(b) and which are in his possession, custody, or control * * *."

[4] The motion also alleged insufficient response to a Government interrogatory.

[5] The hearing lasted nine days, involved numerous witnesses and exhibits, and required almost 1000 pages of printed record.

having satisfactorily shown to the Court that such documents do not exist, and the plaintiffs not having satisfactorily explained to the Court why they have not been produced; and the pattern of the conduct of the plaintiffs' duly authorized representatives, but not including present counsel, clearly showing an unwillingness on their part to make a full disclosure to the defendants; and the plaintiffs' answers to the defendants' interrogatory No. 23 being too vague and wholly insufficient since the answers furnish no details as to any specific documents. I find that the discovery order of this Court of February 9, 1956, has not, in good faith been complied with."

Appellant urges that the District Court erred (1) in holding that appellant had not in good faith complied with the discovery order; (2) in failing to make findings of fact; (3) in assigning to appellant the burden of proving that all of the demanded documents had been produced; and (4) in denying appellant's cross-motion for discovery against the Government.

The Rules are clear that if the information sought is material to the case and not privileged, and if appellant was able to produce it, failure to produce warrants dismissal. The facts relating to these issues are complex and were the subject of a substantial volume of testimony and exhibits, and independent of any rule, conventional fact findings and conclusions of law are necessary to enable us to know the basis of the decision to dismiss.

I differ with the majority only with respect to the grounds for remanding and since it involves a practical problem of day to day work in the District Courts it seems

desirable to expound this position for what it may be worth and to engage the notice of the courts which must deal, and are more competent to deal, with the problem in the first instance.

While it is correct that Rule 52 standing alone or read alone does not in terms call for express special findings on granting *a motion* for dismissal,[6] Rule 41(b) is by reference incorporated and its controlling provisions is:

> "(b) Involuntary Dismissal: Effect Thereof. For failure of the plaintiff to prosecute or to comply with these rules *or any order of court*, a defendant may move for dismissal of an action . . . If the court renders judgment on the merits against the plaintiff, the court *shall* make findings as provided in Rule 52(a). *Unless* the court *in its order* for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue, *operates as an adjudication upon the merits.*" (Emphasis added.)

Since the order did not otherwise specify it follows that the dismissal of appellant's case "operates as an adjudication upon the merits." Unless there is a difference between a "judgment on the merits" and "an adjudication upon the merits" it seems to me that subdivision (b) commands that findings of fact and conclusions of law must be made "as provided in Rule 52(a)."

While the District Court characterized its order as containing "findings," the recitals are conclusory in nature

---

[6] Counsel for appellant requested the District Court to make findings and the court responded, "We don't make findings on a motion. I thought I made my findings in the order."

and, as all of us agree, those recitals do not give us an adequate basis for appellate review on the specific issues we are compelled to treat; viz., (a) materiality of the information sought; (b) possession, custody or control of the information in appellant; and (c) refusal of appellant to obey an order made under Rule 34. In other words we need to know what basic facts the District Court finds as showing each of these elements, together with the conclusions of law which follow in consequence of the application of the pertinent rules, before we can determine whether the evidence warrants a dismissal.[7] Each separate finding of fact is the trier's appraisal or conclusion with respect to part of the total facts of the case. The office of findings in a complex case is to indicate in general terms what evidence persuaded the court to reach a particular conclusion as to the true facts.

"The application of what seems to me the clear language of Rule 41 will not impose an undue burden on district judges. The form or degree of formality of findings varies from case to case. We have said that 'no statute or rule dictates any rigid formula for findings of fact, conclusions of law and opinions; what is desirable for one case does not fit another.'[8] A complex fact situation, for example,

[7] Cf., Societe Internationale, etc., v. Brownell, 1955, 98 U.S.App.D.C. 232, 225 F.2d 532, certiorari denied 350 U.S. 937, 76 S.Ct. 302, 100 L.Ed. 818, certiorari granted 78 S.Ct. 61. The order granting certiorari invited counsel to discuss, among other things, the power of the District Court to dismiss, and the propriety of its dismissal, of petitioner's complaint, under Rule 37(b)(2), for failure to obey its order, for production of documents, issued under Rule 34, in the absence of evidence and of finding that petitioner "refuses to obey" such order.

[8] District of Columbia v. Fadeley, 1956, 98 U.S.App.D.C. 176, 233 F.2d 667, 670, certiorari denied 352 U.S. 847, 77 S.Ct. 64, 1 L.Ed.2d 57.

will usually call for more by way of findings than a simple one. Frequently a memorandum opinion or the recitals in an order will suffice. "It is enough that the findings, taken together give us 'a clear understanding of the basis of the decision.' "[9] In another case[10] we affirmed where the District Court opinion and memorandum afforded "a clear understanding of the basis of the decision." * * * [which was] sufficiently specific to enable us to perform our task of review." Thus a literal compliance with Rule 41(b) will call for elaborate or detailed findings only in the relatively rare motion which, like the instant case, is complex and where the motion issues are resolved only after taking much testimony.

I would, therefore, remand for the making of specific findings of fact and conclusions of law not on our broad inherent powers but upon the narrow ground that Rule 41(b) compels such findings as the nature of the case requires.

---

[9] Minnesota Mining & Mfg. Co. v. Coe, 1941, 75 U.S.App.D.C. 131, 132, 125 F.2d 198, 199, citing Shellman v. Shellman, 1938, 68 App. D.C. 197, 198, 95 F.2d 108; Societe Suisse, etc., v. Cummings, 1938, 68 App. D.C. 154, 156, 94 F.2d 387, certiorari denied 306 U.S. 301, 59 S.Ct. 463, 83 L.Ed. 1033; Goodacre v. Panagopoulos, 1940, 72 App. D.C. 25, 27, 110 F.2d 716.

[10] Food Fair Stores, Inc., v. Square Deal Market Co., Inc., 1953, 93 U.S.App.D.C. 7, 206 F.2d 482, certiorari denied 1954, 346 U.S. 937, 74 S.Ct. 377, 98 L.Ed. 426.

APPENDIX D

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1961

No. 16,365

EDUARD VON DER HEYDT, *et al.*,

Appellants,

—v.—

ROBERT F. KENNEDY, Attorney General of the United States, *et al.*,

Appellees.

Before:

EDGERTON, BASTIAN and BURGER, *Circuit Judges*, in Chambers.

ORDER

Upon consideration of appellants' petition for rehearing, it is

ORDERED by the court that the petition for rehearing is denied.

Per Curiam.

Dated: Feb 20 1962

Filed Feb 20 1962
JOSEPH W. STEWART
Clerk

APPENDIX E

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1961

No. 16,365

EDUARD VON DER HEYDT, *et al.*,

Appellants,

—v.—

ROBERT F. KENNEDY, Attorney General of the United States, *et al.*,

Appellees.

Before:

WILBUR K. MILLER, *Chief Judge*,
in Chambers.

ORDER

Upon consideration of appellants' motion for a further stay of transmission of the opinion and certified copy of the judgment of this court pending application to the Supreme Court for a writ of certiorari, and it appearing that no objections have been filed, it is

ORDERED that transmission to the District Court of the opinion and certified copy of the judgment of this court be, and it is hereby, stayed to and including April 25, 1962.

Dated: Apr 2 1962